Supreme Ct. U.S.
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No. 80-625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALVIN J. SHAPIRO, et al.,
Petitioners,

vs.

MIDWEST RUBBER RECLAIMING COMPANY, MIDCON INDUSTRIES, INC., f/k/a GOODRICH REALTY AND DEVELOPMENT GROUP, INC., CARL H. TOTSCH, RICHARD M. COHEN, MORRIS WEISSMAN, MICHAEL MILLER AND STANLEY KREITMAN,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Alvin J. Shapiro, et al.,
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Midwest Rubber Reclaiming Company, Midcon Industries, Inc., f/k/a/ Goodrich Realty And Development Group, Inc., Carl H. Totsch, Richard M. Cohen, Morris Weissman, Michael Miller And Stanley Kreitman,
Respondents.

Petitioners' Reply to Respondents' Brief in Opposition to Petition for a Writ of Certiorari

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I. Under Applicable Legal Principles, Petitioners Were Damaged by Respondents' Fraudulent Conduct and, therefore, have Standing Under 14(e)

In their Brief in Opposition to Petition for Certiorari, Respondents merely repeat the Eighth Circuit's *ipse dixit* when they state that because Petitioners suffered no damages, they lack "standing." However, use of these labels is misleading without further analysis, which both the Eighth Circuit and Respondents avoid. The legal issue squarely presented but not met by either the Eighth Circuit or Respondents is whether damages are available to non-tendering shareholders in a tender offer situation.

When Respondents made the challenged tender offer, the price which could be realized for Petitioners' Midwest shares -- and, by definition the value of the shares -- was diminished due to the depressing effect of the fraudulent offer and the adverse impact

on Midwest itself occasioned by the success of the offer. Under ordinary principles, damages in such situations exist if, due to misconduct of the offeror, the stock of non-tenderers is depressed below the value it would have had if no fraud had occurred. Such damages are determined at the time of the fraud or its reasonable discovery. If damage, i.e., value depression, exists at that time, then later events, such as the fortuitous subsequent debenture offer here, have no legal effect upon the shareholders' right to sue.

Respondents' reliance on the Eighth Circuit's reference to Hundahl v. United Benefit Life Insurance Co., 465 F.Supp. 1349 (N.D. Tex. 1979), and its statement that the standing issue was not presented, is simply a variation of the basic misconception permeating the Court of Appeals' decision. Damages caused by Respondents' fraudulent scheme result from diminution in share value

at the time of the wrongful conduct (or its discovery), whether shares are tendered or not, and not from the non-tendering shareholders' reliance or non-reliance on the fraud.[1] Thus, even though the Eighth Circuit said that it chose not to reach the question of whether a non-relying plaintiff in a 14(e) case has standing, it failed to recognize that it established a rule which denies standing to a non-tendering plaintiff despite well founded allegations of causation and damages. This is the issue which is at the heart of this Petition.

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1. Reliance cannot be a prerequisite to recovery under 14(e) because the non-tenderer is, by definition, a non-relier. Requiring reliance is tantamount to requiring tender, something even Respondents concede is not the law. See, Electronic Specialty Co. v. International Controls Corp., 409 F. 2d 937 (2d Cir. 1969), relied on by Hundahl, 465 F. Supp. at 1368, where the Court held that the damage which required extending 14(e) to non-tenderers is diminution in share value. Such damages are not due to "reliance," but, instead, to the retention of stock of diminished value caused by the offeror's fraudulent conduct. The search for a relying non-tenderer, which is mandated by the Eighth Circuit's decision, must inevitably be fruitless.

II. The Issue of Standing Under 14(e) is Properly Before the Court

Respondents argue that because standing under 14(e) did not emerge as a pertinent issue until after the Eighth Circuit's opinion was rendered, when Petitioners argued the point in their Petition for Rehearing, that issue is insulated from certiorari review. Obviously, Respondents are in error. Carried to its logical conclusion, Respondents' position means that every reviewable court decision based, as here, on new, unargued grounds raised for the first time by the reviewing court (and thereafter in the petition for rehearing), is immune from review and stands -- albeit erroneously -- as the law of the land. Not only was the present issue raised below, but, this Court can, and does, consider issues not even raised below, as well as issues not even contained in the Petition for Certiorari, where, as here, the issues raised by the reviewing

court are of sufficient importance. Kessler v. Strecker, 307 U.S. 22,34 (1939). Clearly, certiorari review is appropriate where the issue was raised below, is the principle issue upon which the Court below rested its decision and is the issue upon which review is sought.2

III. As One of the Few Remaining Implied Rights of Action Under Federal Securities Law, 14(e) Should be Evenhandedly Applied To Both Tendering and Non-Tendering Shareholders.

This case involves an implied right of action under 14(e) of the Securities Exchange Act of 1934. Recently, this Court has

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2. The Respondents' cases are inapposite, as befits their argument. In Lawn v. United States, 355 U.S. 339, reh. denied, 355 U.S. 967 (1958), the Court denied review on an issue not raised before the lower court and not mentioned in the certiorari petition. In United States v. Ortiz, 422 U.S. 891 (1975), the Court denied review of an issue that was specifically disavowed by the party seeking to raise it before the Court. The decision not to review in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970), was based on the petitioners' abandonment in the appellate court of an issue ruled on by the district court.

strictly limited such implied rights of action. Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979). Perhaps the only implied right of action remaining viable under the federal securities is, as this Court noted in Touche Ross & Co. v. Redington, supra, at 577 n.19, the well established action available under 10(b), of which 14(e) is the exact tender-offer counterpart. R. Phillips & M. Miller, "The Demise of Implied Rights," 13 Review of Securities Regulation, 887 (August 27, 1980). Since the implied right of action under 14(e) is available to shareholders, it must be applied evenhandedly and in a nondiscriminatory fashion to non-tendering shareholders harmed by fraudulent conduct as well as to shareholders who do tender or trade.

Conclusion

For the foregoing reasons, and those set forth in the Petition for a Writ of Certiorari, a writ of certiorari should issue to the United States Court of Appeals for the Eighth Circuit to review the judgment entered by that Court in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lowell E. Sachnoff, counsel for Petitioners, hereby certify that on December 6, 1980, true and correct copies of the foregoing Reply were served on all parties required to be served by mailing copies to counsel for all parties as listed on the attached Service List via first class mail, postage fully prepaid.

Dated: December 6, 1980

LOWELL E. SACHNOFF